ANDREW J. DAVIS

vs.

HIRAM R. MILLS AND CLARENCE C. FROST

---

otion on behalf of Hiram R. Mills, sole surviving
defendant in the above entitled action, for the
certification of the entire record therein
to this Court.

21676

Supreme Court of the United States,

October Term, 1903,

No. 235.

ANDREW J. DAVIS

vs.

HIRAM R. MILLS and CLARENCE C. FROST.

Motion on behalf of Hiram R. Mills, sole surviving defendant in the above-entitled action, for the certification of the entire record therein to this court.

To the Honorable the Supreme Court of the United States:

Comes now Hiram R. Mills, sole surviving defendant in the above-entitled cause, and moves the court as follows:

For an order requiring the whole record and cause in the above-entitled action to be sent up by the Circuit Court of Appeals to this court for its consideration.

This motion is based on the record, a certified copy of which is herewith submitted, and on the statement hereto attached of the questions arising upon the record.

WM. WALDO HYDE,
Solicitor for Hiram R. Mills, sole surviving defendant.

STATEMENT.

In the above-entitled cause a question of law concerning which the Circuit Court of Appeals for the Second Circuit desires instruction of this court has been certified to this court in accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing courts of appeal, etc., as will appear from the record, No. 235 of the October term, 1903, of this court.

This cause is an action at law which was commenced in the Circuit Court of the United States for the District of Connecticut by Andrew J. Davis, plaintiff, against Hiram R. Mills and C. C. Frost, defendants, by writ and declaration wherein the following facts were alleged:

(*a*) That on and prior to the 1st day of September, A.D. 1890, the defendants and others were trustees of the Obelisk Mining and Concentrating Company, a corporation organized under the laws of the state of Montana and located at Butte City, in said state, and that the defendants then were and at all times since have been residents and citizens of the state of Connecticut and non-residents of said state of Montana.

(*b*) That said corporation filed a report as required by the statute of the state of Montana on the 20th day of September, 1890, and on the 1st day of September, A.D. 1892, signed by its president and a majority of the trustees of said company and verified by the oath of the president and secretary of said company stating the amount of its capital, the proportion actually paid in, and the amount of its existing debts, but that said corporation failed to file such

annual report of its affairs as required by said statute in September of the years 1891 and 1893.

(*c*) That on the 31st day of May, A.D. 1892, the said Obelisk Mining and Concentrating Company gave its note at sixty days without grace to the State Savings Bank of Butte City, Montana, for $1,000, which note was not paid at maturity, and that on or about the 24th day of June, 1897, said State Savings Bank of Butte City, Montana, transferred and assigned and indorsed said note to the plaintiff, A. J. Davis.

(*d*) That on and prior to the 27th day of April, A.D. 1892, F. E. Miller and Charles A. Chapman, copartners in business at said Butte City, Montana, claimed to have sold and delivered to the said Obelisk Mining and Concentrating Company certain goods of the value of $1,319.07, and that on or about the 8th day of November, 1893, said Miller and Chapman assigned all their property, including the above described account, to Adam F. Brown in trust for the purpose of paying all the debts of said F. E. Miller and Charles A. Chapman, and that on or about the 21st day of September, 1895, the said Adam F. Brown, as such assignee of the said Miller and Chapman, obtained judgment against the said Obelisk Mining and Concentrating Company on account of said indebtedness for the sum of $1,365.53, and that on or about the 24th day of June, A.D. 1897, the said Brown, as such trustee, transferred and assigned said claim under said judgment to the plaintiff, A. J. Davis.

(*e*) That the Butte Hardware Company, a corporation organized and existing under and by virtue of the laws of the state of Montana, at sundry times between the 5th day of January, 1892, and the 12th day of December, 1892, sold and delivered to the said Obelisk Mining and Concentrating Company goods,

wares, and merchandise of the value of $1,968.96, which claim by payments thereon was subsequently reduced to $1,071.36, and that on or about the 24th day of June, 1897, said Butte Hardware Company assigned said claim to the plaintiff, said A. J. Davis.

(*f*) That neither of the said debts nor any part thereof have ever been paid, and that the said Obelisk Mining and Concentrating Company was wholly insolvent and had no property out of which the said indebtedness could be paid.

(*g*) That Section 460 of Chapter 25 of the fifth division of the compiled statutes of the state of Montana provided as follows:

> "Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city, or village, or if there be no newspaper published in said town, city, or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee or board of trustees by virtue of the provisions of this section for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned, said trustee, or board of trustees, or company shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation."

(*h*) That the said Obelisk Mining and Concentrating Company having failed to make the report required by said section of the statutes of Montana, the defendants were jointly and severally liable for the above described indebtedness of said corporation.

Said action was commenced by service upon the defendants on June 30, 1897, and the declaration then contained two counts, one based upon the aforesaid note to the State Savings Bank of Butte City of $1,000, dated May 31, 1892, due July 31, 1892, and the second count based upon said claim of Miller and Chapman for goods sold and delivered prior to April 27, 1892, amounting, less payments thereon, to $1,365.53.

On October 18, 1897, by an amendment a third count was added to said declaration based upon said claim of the Butte Hardware Company for goods sold and delivered between January 5, 1892, and December 12, 1892, amounting, less payments, to $1,071.36.

The defendants objected to the combining of the three causes of action, neither one of which was of sufficient amount to give jurisdiction to the United States Circuit Court, on the ground that the statute of Montana on which said suit was brought was penal and that each cause of action was separate and distinct in nature, and that under the rules and practice of the Connecticut courts it was improper to join them for the purpose of raising the amount in question to the limit required by the statute of the United States to give jurisdiction to the United States Circuit Court.

Judge Shipman in the United States Circuit Court for the District of Connecticut overruled this objection, 83 Fed. Rep., 982, basing his decision upon the language of the opinion of Judge Gray in the case of Huntington *versus* Attrill, 146 U. S., 657, and allowed the plaintiffs to combine the three causes of action.

The defendants then filed a plea to the jurisdiction of the United States Circuit Court upon the ground that the statute of Montana upon which this action was based was penal in its character and could not be enforced outside the limits of the state of Montana.

Judge Townsend of the United States Circuit Court for the District of Connecticut held said plea not good, 99 Fed. Rep., 39, basing his opinion upon the language of the case of Huntington *vs.* Attrill above referred to.

The defendants then demurred to the complaint upon the ground that the cause of action therein set forth was barred by the statute of limitations both of the state of Montana and of the state of Connecticut.

The plaintiff in his brief and on his argument claimed that under the wording of the opinion in the case of Huntington *vs.* Attrill above cited the statute in question was not penal.

The plaintiff further claimed that if penal the action did not come within the intent of the section of the statute of the state of Connecticut governing actions for a forfeiture or penalty, being Section

1120 of the General Statutes of Connecticut, revision of 1902, reading as follows:

> "No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

The defendants claimed on the hearing before Judge Townsend that this Honorable Court in its decision as rendered by Judge Gray in Huntington *vs.* Attrill, *supra,* did not intend or mean that a statute of the character of the Montana statute upon which this action was based was not penal in so far as the application of the statute of limitations was concerned.

The defendant contended that the Montana statute, except as it is construed to be *penal,* is unconstitutional in that it goes the full length of providing that the debt of a corporation shall become the debt of an individual and a stranger solely because of failure to perform a subsequent act, and that except as it is construed to be a measure of a *penalty* for failure to conform to a public requirement such statutory enactment is invalid because unconstitutional.

The statute provides that upon the failure to file the required reports the trustees shall be personally liable "*for all debts of the corporation* THEN EXISTING," as well as for all thereafter contracted.

As to such debts as are contracted *after* the failure to conform to the requirements of the corporation law, it may be claimed that the corporate exemption from liability is to that extent removed; that the trustees contract knowing that the exemption is

so removed and so bind themselves and voluntarily offer to the creditor the additional remedy of their own personal obligation.

No such reasoning, however, is applicable to the case of corporate debts contracted *before* failure to conform to the statutory requirement.

In such case no theory is apparent which can defend the validity of the statute except that it is penal.

The defendants therefore contend that this question has not been reached by this court, either in the case of Huntington *vs.* Attrill or in any other reported decision.

An entirely distinct question is presented when, as in Huntington *vs.* Attrill, a judgment has been secured upon the statute in the home state which is sought to be enforced in a foreign state.

The defendants further claimed that the highest court of the state of Montana in the case of Bank *versus* Johnson, 18th Montana, 440, had held the statute of Montana creating the cause of action upon which this suit is based to be penal, in so far as the application of the statute of limitations was concerned.

The defendants also claimed that the statute of the state of Connecticut above quoted concerning limitations of suits for forfeiture under penal statutes governed the court in this case.

Judge Townsend, whose opinion is reported in 113 Fed. Rep., 678, sustained the defendant's de-

murrer to the complaint, whereupon the plaintiff by writ of error removed the case to the Circuit Court of Appeals for the Second Circuit, where the questions raised by the demurrer were again argued before Judges Wallace, Lacombe, and Cox.

In each of these presentations of the case the scope, meaning, and intent of the opinion in the case of Huntington *vs.* Attrill and of conflicting decisions in other courts more or less dependent thereon were presented and discussed on one side and the other.

The questions raised upon the argument of the demurrer, in addition to those certified to this court, were:

1st. Is the statute of the state of Montana under which this suit is brought penal in so far as the application of the statute of limitations is concerned?

2d. The statute of Montana in question having been held by the Supreme Court of that state to be penal in so far as the application of the statute of limitations is concerned, is not the decision of that court final and binding everywhere?

3d. Does the re-enactment of the old statute of Montana in substantially the same form in the new statute carry with and into it the judicial construction which the former statute had received in the highest court of the state?

The statute of Montana in force at the time when the rights of action upon which this suit is brought

accrued was Section 45 of the Compiled Statutes of Montana, which reads as follows:

> "(1.) In an action for a penalty or forfeiture, when the action is given to an individual, or to an individual and the territory except where the statute imposing it prescribes a different limitation" . . . "shall be commenced within one year."

This statute was construed by the Supreme Court of Montana in the case of Bank *vs.* Johnson, 18 Montana, 440, as being penal in so far as the application of the statute of limitations was concerned.

After the rights of action upon which these suits were brought accrued, but before suit was brought, Section 45 above cited was repealed by the Code of Civil Procedure, and the following section was substituted:

> "Sec. 515. Within two years:
> "1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

Section 45 of the Compiled Statutes having been construed by the Supreme Court of Montana to be penal in so far as the application of the statute of limitations was concerned, the defendants claimed that by re-enacting that statute in Section 515 of the Civil Code in substantially the same language the legislature carried into that statute the judicial construction which the former statute had received.

4th. Is the action barred by the statute of limitations of Connecticut above quoted, being Section 1120 of the General Statutes, revision of 1902?

The defendants claimed, and Judge Townsend sustained their contention, 113 Fed. Rep., 678, that the action was barred by the statute of limitations of the state of Connecticut, basing his decision upon the case of Mitchell *vs.* Hotchkiss, 48 Conn., 1, where the Supreme Court of the state of Connecticut held that the statute of the state of Connecticut which provides that in the case of every corporation a certificate showing its condition shall be filed annually by the president and secretary with the town clerk and that in case of neglect those officers shall be liable for all the debts of the corporation contracted during the period of such neglect is penal.

The Circuit Court of Appeals, however, apparently relying upon the case of Plum *vs.* Griffin, 74th Conn., 132, where the court held that a statute providing that any person who cut trees or timber on the land of another without his license should pay to the injured party two dollars for each and every tree of one foot in diameter, and for all trees of a greater diameter three times their value besides the two dollars, was not penal, overruled the decision of Judge Townsend upon this point.

5th. The main question considered by Judge Shipman, Judge Townsend, and by the Circuit Court of Appeals in this case was whether the decision in the case of Huntington *vs.* Attrill goes to the extent of deciding that a statute of the character of the Montana statute upon which this action is brought is not penal in so far as the application of the statute of limitations is concerned, notwithstanding the decision of the highest court of the state of Montana that it is penal in that respect.

The question submitted to this court by the justices of the Circuit Court of Appeals for the Second Circuit limits the discussion to the question as to whether or not Section 554 of the Civil Code of Montana applies to the action at bar.

Section 554 reads as follows:

> "Sec. 554. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability created."

The defendants submit that this question does not fully present the issue in such manner that your Honors can fairly pass upon the same.

In view of the contradictory decisions cited by the Circuit Court of Appeals for the Second Circuit in this case (see 121 Fed. Rep., 705), to wit: Hobbs *vs.* National Bank, 37 C. C. A., 513, 96 Fed. Rep., 396; same case on rehearing, 41 C. C. A., 205; 101 Fed. Rep., 77; Brunswick Terminal Co. *vs.* National Bank of Baltimore, 40 C. C. A., 22; 99 Fed. Rep., 635; Whitman *vs.* Citizens Bank, 49 C. C. A., 122; 110 Fed. Rep., 503; and the cases of Fitzgerald *vs.* Weidenbeck, 76 Fed. Rep., 695, and First Nat'l Bank of Butte *vs.* same, 97 Fed. Rep., 896, where the very statute of Montana in question in this suit was under discussion, the defendants submit that a full discussion of the entire question makes it necessary that the whole record and cause should be before this court.

The questions involved are of such character and importance and of such general interest, and are so

involved, and the courts are so divided in their opinion as to the proper application of the decision in the case of Huntington *vs.* Attrill to cases of this character, where no judgment is involved, that all said questions should be taken into consideration by your Honors and set at rest.

The defendant presents herewith and makes a part of this motion a certified copy of the transcript of record of this cause from the Circuit Court of Appeals for the Second Circuit.

WM. WALDO HYDE,
Solicitor for Hiram R. Mills, sole surviving defendant.